

HENG CHENG SWEE v. BANGKOK BANK LTD. A

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo) and Wan Suleiman F.J.) January 19, 1976]

[Kuala Lumpur — Federal Court Appeal No. 34 of 1975]

Contract — Letter of guarantee — Continuing guarantee — Limitation of liability — Bank allowing overdrafts exceeding limit — Whether contract varied — Other guarantees accepted by bank — Contracts Act, 1950, ss. 86, 92.

The appellant had given a letter of guarantee by which he agreed to guarantee up to a limit of \$75,000.00 the payment of all advances made by the respondent bank to the Malaysia Timber and Granite Products Ltd. In pursuance of this guarantee the respondent bank made advances to the company amounting to \$534,408.74. The respondent bank demanded payment from the company but no payment was made. The respondent bank claimed the payment of the guaranteed sum of \$75,000 from the appellant. Judgment was given in favour of the respondent bank in the High Court and the appellant appealed to the Federal Court. It was argued *inter alia* (1) that by giving advances to the company considerably over the limit of \$75,000 without consulting the appellant, the respondent bank had varied the contract within the meaning of section 86 of the Contracts Act and therefore discharged the appellant from his liability under the guarantee; (2) that in addition to the letter of guarantee signed by the appellant, the respondent bank had also accepted guarantees given by the directors of the company and as a result the appellant's guarantee became merged in those other guarantees and therefore the appellant's liability had been discharged; (3) that as a surety the appellant could have recourse against the assets of the company but because of the further advances made by the respondent bank the company had to go into compulsory liquidation and so the appellant's remedy had been impaired.

Held, dismissing the appeal; (1) the appellant in this case had signed a continuing guarantee, guaranteeing the overdraft existing at the time when he signed the letter of guarantee as well as overdrafts to be made in the future. The guarantee was not limited only to the amount of the overdraft existing on the date of the letter of guarantee. There was also a provision in the letter of guarantee empowering the bank to make further advances to the company;

(2) the letter of guarantee stated that it was to be in addition to any collateral or other security held or to be held by the bank;

(3) the respondent bank had done nothing inconsistent with the appellant's rights.

Cases referred to:-

- (1) *Laurie v. Scholefield* (1869) L.R. 4 C.P. 622 at 626.
- (2) *Tan Chong & Sons Motor Company Ltd. v. Yang Chin Lang* [1967] 1 M.L.J. 125.
- (3) *Lloyd's v. Harper* (1880) 16 Ch.D. 290, 303.
- (4) *Parker v. Wise* (1817) 105 E.R. 1232.
- (5) *Gordon v. Rae* (1858) 120 E.R. 396.
- (6) *Sanderson v. Aston* (1873) L.R. 8 Ex. 73.
- (7) *National Bank of Nigeria Ltd. v. Awolesi* [1964] 1 W.L.R. 1311.
- (8) *Ward v. National Bank of New Zealand Ltd.* (1883) 8 A.P. 755.
- (9) *Holme v. Brunskill* (1878) 3 Q.B.D. 495, C.A.
- (10) *In re Sherry, London and County Banking Co. v. Terry* (1884) 25 Ch.D. 692, C.A.
- (11) *K.R. Chitguppi & Co. v. Vinayak Kashinath Khadilkar* (1921) I.L.R. 45 Bom. 157; 1921 A.I.R. Bombay 164.
- (12) *Union of India v. Pearl Hosiery Mills* (1961) A.I.R. Punjab 281.
- (13) *Prenn v. Simmonds* (1971) 3 All E.R. 237.
- (14) *Clifford v. Turrell* (1845) 14 L.J. Ch. 390, 397.
- (15) *Wright & Anor. v. New Zealand Farmers' Co-operative Association of Canterbury* (1939) 2 All E.R. 701, 705.
- (16) *China Insurance Co. Ltd. v. Ngau Ah Kau* (1972) 1 M.L.J. 52, 54.
- (17) *Hamilton v. Watson* (1845) 12 Cl. & Fin. 109, 119.

- (18) *Westminster Bank v. Cond* (1940) 46 Com. Cas. 60.
- (19) *Cooper v. National Provincial Bank Ltd.* (1945) 2 All E.R. 641.
- (20) *Whitcher v. Hall* L.R. 7 Q.B. 866.
- (21) *Radha Kanta Pal v. United Bank of India* A.I.R. (1955) Cal. 217, 221.
- (22) *A.K.A. Khan Ghuzuazi v. National Bank of India* 33 I.C. 34.
- (23) *Ah Yan v. President, Wabema Municipal Committee* 175 I.C. 255.
- (24) *Clayton's Case* (1816) 1 Mer. 572.

FEDERAL COURT.

R. R. Sethu for the appellant.

O. C. Lim for the respondent.

In the court below the following judgment was delivered on February 22, 1975:

Hashim Yeop A. Sani J.: This is a claim by the plaintiff bank for the recovery of the sum of \$75,000 with interest and costs based on a contract of guarantee executed by the defendant on August 4, 1966. A copy of the contract of guarantee is at enclosure (13) in the Agreed Bundle (P1). In their pleadings the plaintiffs state that in pursuance of the said letter of guarantee the plaintiffs made advances to the Malaysia Timber and Granite Products Limited (hereinafter referred to as "MTGP") which together with interest, commission and banking charges amounted to \$534,408.74 as at July 27, 1969. By letter dated December 7, 1968 the plaintiffs through their solicitors to MTGP demanded payment of the sum of \$462,039.39 being the amount then due as neither MTGP nor the defendant had paid the said sum or any part thereof. By a further letter dated August 11, 1969 the plaintiffs through their solicitors to the defendant demanded payment of the said sum of \$75,000 but the defendant had not paid the said sum or any part thereof. It is the contention of the plaintiffs that the contract of guarantee is a continuing one and that the liability of the defendant on the said guarantee is limited to the principal sum sued for.

The defendant does not deny the guarantee but seeks to avoid it. In his pleadings he seeks to invoke a number of legal defences both under the Contract Law and Equity. His defences may be summarised as follows. First he alleges fraud or misrepresentation by one Gary Wong, his nephew, and/or the plaintiff bank which induced him to execute the said letter of guarantee. Therefore he contends, the contract of guarantee is voidable at his instance under section 19 of the Contracts Act, 1950, or invalid under section 95 and/or 96 of that Act. Secondly he alleges that there were a number of variations made in the contract, which variations were made without the knowledge or consent of the defendant and therefore he is discharged as a surety thereby under section 89 of the Contracts Act, 1950. On this point he alleges that approvals of applications by MTGP for increasing the overdraft limit from time to time after August 4, 1966 were material circumstances which the plaintiffs should not have withheld from him in view of section 86 and/or 92 of the Contracts Act, 1950. The defendant contends that there is an implied term in the contract of guarantee that the maximum overdraft by the plaintiff bank to MTGP would be limited to \$75,000 even

though the said guarantee permitted loans of an unlimited amount. By allowing the amount of overdraft to exceed \$400,000 after the date of the said guarantee when the plaintiff bank knowing fully well that the paid-up capital of MTGP was only \$250,000 it is the defendant's view that the plaintiffs' action was reckless and speculative. MTGP has now been ordered into compulsory liquidation with liabilities totalling over \$1,000,000. This the defendant contends has impaired his right to resort first to MTGP for remedy and therefore the actions of the plaintiffs have to that extent prejudiced his right. Finally, the defendant invokes the rule in Clayton's case as codified in section 62 of the Contracts Act, 1950 to the current account of MTGP with the plaintiff bank and that whatever liability that the defendant may have to the plaintiff as at the date of such variation has been settled and wiped out by the payments into the same account after the date of such variation.

The facts of this case are in my view straightforward. The contract of guarantee in question was handed to the manager of the plaintiff bank (PW1) by the said Gary Wong. It is not in dispute that there had never been any communication between the defendant and the plaintiff bank until a copy of the notice of demand dated December 7, 1968 from the plaintiff bank to MTGP followed by the notice of demand dated August 11, 1969 from the plaintiff bank to the defendant. It is admitted also that before and after August 4, 1966, that is the date of the contract of guarantee in question, all personal guarantees were provided by the directors of MTGP with resolutions to that effect. These guarantees were for various amounts culminating in a guarantee for \$400,000 dated May 6, 1967 (see Exhibit 17 in P1). The format of all these letters of guarantee is exactly the same and this is admitted in evidence by the plaintiff bank's manager (PW1). Also agreed is that only on two occasions after August 4, 1966 did the accounts of MTGP show a credit balance namely on September 19, 1966 and August 17, 1966. After November 2, 1966 the said account never showed a credit balance until the account was closed on November 27, 1968. (See Exhibit 29 in P1.)

It would seem obvious that the business operation of MTGP was substantially financed by the plaintiff bank supported by these various guarantees including the plaintiff bank's own guarantee as seen in enclosures (25) and (26) in P1. The defendant's guarantee is at enclosure (13) in P1. The other guarantees are the director's guarantees referred to earlier at enclosures (1), (9) and (17) in P1. It could also be inferred from these various guarantees and also in the testimony of PW1 that the plaintiff bank showed interest in the progress of MTGP as a growing business concern. Enclosure (8) in P1 shows a letter from the plaintiff bank providing MTGP with business contacts in the supply of timber for shipment. In the testimony of PW1 he said that some applications for overdraft facilities were made in writing by Gary Wong but there were others which were only made verbally. As manager of the plaintiff bank he said he had his discretion in matters of granting such facilities to business concerns. In this case he said that Gary Wong had kept his word in the past and when he said "payments would be made payments were really made."

A He admitted that the account of MTGP was generally in the debit but he said for a growing company that is not unusual. He also knew that the paid-up capital was only \$250,000 but he said if banks go strictly by the paid-up capital of their clients then they cannot help promote the growth of business. It is not my function to comment on the exercise of discretion in such matters by the plaintiff bank's manager but I am satisfied that in this case he exercised it in good faith.

B The first point raised by the defendant may be considered first namely whether there was fraud or misrepresentation to induce the defendant to execute the said letter of guarantee. The defendant has sought to establish that he executed the letter of guarantee solely on the belief that it was a guarantee for a short period and in relation only to the purchase of an interest in a certain mine. We are here to construe a guarantee executed by the defendant and to determine whether he is still liable under the guarantee. In *Laurie v. Scholefield*⁽¹⁾ Byles J. said:

C "We are asked to construe a guarantee in their terms: (the learned Judge here read the guarantee). In the construing of the guarantee, we cannot look to what was said at the time of giving it; such evidence is not admissible; but we may look at the position of the parties."

D The issue between the parties here must surely rest on the construction to be placed on the words of the guarantee in question. The principles to be applied in construing a document of this kind are re-stated in *Tan Chong & Sons Motor Company Ltd. v. Yang Chin Lang*⁽²⁾ following *Lloyd's v. Harper*⁽³⁾ and that is that "a guarantee, like every other contract, must be construed reasonably; it must be construed by the words used, but also with regard to the surrounding circumstances."

E The consideration in the guarantee in question is stated clearly in Clause 1 thereof as follows:—

F "In consideration of the Bangkok Bank Ltd. (hereinafter called 'the Bank' making or continuing advances or otherwise giving credit or affording banking facilities for as long as the Bank may think fit to Malaysian Timber & Granite Products Ltd. of Nos. 121-1B, Jalan Imbi, Kuala Lumpur (hereinafter called 'the principal') I, the undersigned, Heng Cheng Swee, Advocate and Solicitor, Kuala Lumpur, hereby jointly and severally"

G In the words of Lord Lyndhurst L.C. in *Clifford v. Turrell* (1845) 14 L.J. Ch.390 at 397:

H "...the settled rule of law is, that you may prove a further consideration stated on the face of the deed. You cannot be allowed to prove a consideration inconsistent with it, but you may prove another which stands with it."

I In this case the defendant would seem to be urging the court to believe in the existence of a different consideration from that stated in the guarantee in question which in my view should not be entertained.

The other point raised related to this is whether there is an implied term as to the limit of overdraft. The answer to that is simply this: how could there be an implied term not to grant overdraft facilities beyond \$75,000 by the plaintiff bank to MTGP when it is expressly provided in the guarantee itself that the guarantee was given in consideration of the plaintiff "making or continuing advances or otherwise giving credit or affording banking facilities for as long as the bank may think fit." Clause 7 of the guarantee in

question makes it clear that the plaintiff bank shall be at liberty without any further consent or knowledge at any time to grant to the principal "...any time or indulgence, and to determine, enlarge or vary any credit to the principal ... without discharging or in any manner affecting my/our liability under this guarantee." Furthermore, as pointed out earlier in this judgment, I am satisfied that the manager of the plaintiff bank had exercised his discretion in good faith in granting the various overdraft facilities.

It would be in my view pertinent to quote the learned authors of the *Encyclopedia of Forms and Precedents* (4th Edition) Volume 2 page 879 at Footnote 17:—

"Often a surety is only willing to guarantee the payment of advances made by a bank to a customer provided such advances do not exceed altogether a certain named figure, which in the surety's opinion the customer will be able to meet. To carry out this intention the guarantee should not only provide that the surety's liability shall not exceed a certain sum, but should also stipulate that the advances shall not exceed the limit either, for without such a stipulation, there is nothing to prevent the bank from making unlimited advances to the customers (see *Laurie v. Scholefield* (1869) L.R. 4 C.P. 622.)"

In the case of *Laurie v. Scholefield*⁽¹⁾ (a case of whether the bank could advance above £1,000 on the strength of a guarantee) Montague Smith J. said at page 627:

"If it had been intended that no advances beyond the £1,000 should be made during the currency of the suretyship, I should have expected more precise words."

This case followed the decision of *Parker v. Wise*.⁽⁴⁾ In that case the surety was also contending that the bank should not advance beyond the agreed amount in overdraft. Lord Ellenborough C.J. said at page 1235:

"Had the surety, as it has been argued, intended to impose a condition on his part that the bankers should not advance beyond 5000l., in order (247) to make sure that the manufacturers should not by an indefinite supply of funds be led into a more extensive course of dealing than he contemplated, it would have been easy to have provided for such a condition, by stipulating that the obligation should be void if any further advance were made."

And further down the page, his Lordship continued:

"for it might well be, as between the bankers and their customers, that the latter should ask, and, therefore, be in a situation to demand only a limited advance, and yet that it should be in the breast of the bankers to go further if they pleased, and that the surety might be content to pledge his security to a limited extent without imposing it as a condition, that if more were advanced he would not be answerable to the amount limited. And as this was a reasonable, and therefore probable engagement, and the surety has made no provision as [248] it regards himself, to restrain a further advance, and as such a provision if it had been intended might easily have been introduced, the conclusion I have arrived at is, that it was not intended."

The case of *Parker v. Wise*⁽⁴⁾ was followed by the case of *Gordon v. Rae*.⁽⁵⁾ At page 405 Crompton J. said:

"... unless the bond clearly showed that the parties intended that the restriction was to operate as a condition upon which the whole security was to become void, the advancing to a greater amount would be no defence."

In all the above cases there had been some evidence in the guarantees to suggest an intention on the part of all parties that some limit should be imposed on the amounts to be advanced and the creditor had

exceeded the limit sought to be imposed. Yet the courts in each case had refused to discharge the surety on that ground, stipulating that before such a penal construction could be upheld, the courts needed very clear words making the term amount to a condition of the guarantee, the breach of which would discharge the surety.

The next related point raised by the defendant alleges that there were a number of "variations" made to the terms of the contract since the day he executed the guarantee and that which "variations" were made without his knowledge or consent. This would seem to flow from the earlier point of the purported implied term of the limit of overdraft. Two questions must be answered to satisfy this point, namely, was there any variation in the first place and secondly did the variation substantially alter or prejudice the position of the defendant.

The case of *Sanderson v. Aston*⁽⁶⁾ is relevant to this point. In that case, the defendant gave a bond to the Plaintiff that the defendant would pay to the plaintiff all moneys which one Johnson might receive on the plaintiff's account in consideration of the plaintiff employing Johnson as a "clerk and traveller." Johnson proved to be dishonest and the plaintiff sued the defendant on the bond. Termination of employment was originally fixed at one month's notice. That was subsequently changed to three months' notice without the defendant's consent. That term was not a term of the guarantee. The court held that the surety was not discharged. Kelly C.B. in his judgment at page 76 said:—

"The authorities cited go to shew that we are to look at the terms of the surety's engagement; not at the terms of any agreement between the employer and employed, unless these terms are made part of the surety's agreement, or unless something has been done, which, with reference to those terms substantially alters his position."

The defendant would seem to rely on *National Bank of Nigeria Ltd. v. Awolesi*⁽⁷⁾ at page 1316:

"In *Ward v. National Bank of New Zealand Ltd.*⁽⁸⁾ their Lordships said: 'A long series of cases has decided that a surety is discharged by the creditor dealing with the principal or with a co-surety in a manner at variance with the contract, the performance of which the surety had guaranteed.' The same judgment adopted the language of Cotton L.J. in *Holme v. Brunskill*⁽⁹⁾ where he said: 'The true rule in my opinion is, that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that if he has not consented to the alteration, although in cases where it is without enquiry evident that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged; yet, that if it is not self evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety, the court will not, in an action against the surety, go into an inquiry into the effect of the alteration....' In *In re Sherry, London and County Banking Co. v. Terry*⁽¹⁰⁾ Lord Selborne L.C. referred to the rule saying: 'A surety is undoubtedly and not unjustly the object of some favour both at law and in equity, and I do not know that the rules of law and equity differ on this subject'."

On the construction of the contract in that case there was a substantial variation of the contract of guarantee to the prejudice of the respondent without his knowledge for he lost the benefit of all sums paid in by the principal debtor into his No. 2 account, which was, as the ledger showed, at times in credit to the extent of as much as £2,500. The respondent's guarantee was therefore held to have been discharged.

But the words of the guarantee in this case are in my view clear that the consideration is for the plaintiff bank to make or continue advances to MTGP for as long as the bank may think fit and that the defendant agree to satisfy the bank on demand "all and every the sum and sums of money which are now or shall at any time be owing or remaining due and unpaid to the bank anywhere on any account whatsoever..." Clause 4 of the guarantee also makes it clear that the guarantee shall be a continuing guarantee. Clause 7 speaks of the right to enlarge or vary the credit to the principal.

After consideration of the above authorities it is my opinion that the alleged variation does not fall within the meaning of the rule in *Holme v. Brunskill*⁽⁹⁾ and therefore the second question posed earlier need not be answered.

The final question posed by the defendant is the application of the rule in *Clayton's* case to the current account of MTGP with the plaintiff bank. This rule is codified in section 62 of the Contracts Act, 1950 which is reproduced as follows:—

"62. Where neither party makes any appropriation the payment shall be applied in discharge of the debts in order of time, whether they are or are not barred by the law in force for the time being as to the limitation of suits. If the debts are of equal standing, the payment shall be applied in discharge of each proportionably."

The fact that the defendant's guarantee is a continuing guarantee is not doubted because of the express words used in the contract itself in clauses 3 and 4 of the guarantee in question. It is clearly provided in clause 1 that the defendant would pay for "every sum and sums of money which are now or shall at any time be owing or remaining due and unpaid to the bank anywhere on any account whatsoever." It is an established rule that a continuing guarantee is not affected by any payment in for it is framed to secure the final debit balance. This liability is expressly provided in the guarantee in question. I fail to see how this proposition can be read against the express words of the guarantee in question. Clause 9 of the guarantee itself provides that that guarantee shall be in addition to and shall not be in any way prejudiced or affected by any collateral or other security now or thereafter held by the plaintiffs.

For the above reasons it is my opinion that the plaintiffs must succeed. Judgment is accordingly entered for the plaintiffs in the sum of \$75,000 with interest at the rate of 6 per cent per annum from the date of filing of writ to date of realisation. Costs of this suit shall be borne by the defendant.

[From the above judgment the defendant appealed to the Federal Court.]

Suffian L.P.: There are two separate judgments in this appeal, one by me and the other by my Lord the Chief Justice of Borneo.

First I shall read my own judgment, and then the one by the Chief Justice who is absent.

Suffian L.P.: The Bangkok Bank, plaintiff in the lower court and respondent before us, gave overdrafts to a company, the Malaysian Timber and Granite

A Products Ltd. I shall refer to the company simply as the company.

B In the course of its business it applied for and obtained overdrafts from the bank on many occasions. The bank asked for guarantees. On one occasion Mr. Gary Wong, Managing Director of the company, went to his uncle, a lawyer, the defendant in the lower court and appellant before us, to persuade the uncle to guarantee the company's overdraft with the bank. The defendant agreed, and signed a letter of guarantee on a standard form supplied by the bank. A copy of that letter is at page 101 of the appeal record. It is dated August 4, 1966. The bank must have known that the guarantor was a lawyer because the defendant stamped it with his official rubber stamp. **C** Mr. Gary Wong handed the letter to the bank.

The company's account was active until August 1968. Finally came a time when the company owed the bank \$462,030.39. On December 7, 1968, the bank wrote to the company demanding payment of this amount. The company did not pay.

D On June 9, 1969, the company was ordered into compulsory liquidation. After that, on August 11, 1969, the bank wrote a letter to the defendant demanding payment of \$75,000. It is common ground that the defendant's liability under the guarantee is limited to \$75,000.

E The defendant denied liability.

The learned trial judge gave judgment for the bank.

The defendant has appealed to us.

F It is argued before us by Mr. Sethu for the defendant that there was an implied term in the contract between the bank and the defendant that the bank was to limit its overdraft to the company to \$75,000, that as the bank had thereafter increased its overdraft to the company the bank had varied the terms of the contract between the company and itself without the defendant's consent, therefore the defendant is discharged as to transactions subsequent to the variation, and section 86 of the Contracts Act, 1950, is quoted in support of this proposition. That section reads:

G "Any variance, made without the surety's consent in the terms of the contract between the principal debtor [the company] and the creditor [the bank], discharges the surety as to transactions subsequent to the variance."

H It is undisputed that after the date when the defendant signed the letter of guarantee (August 4, 1966) the company's account was in credit only on two occasions:

- (1) on September 19, 1966, when a cheque for \$250,000 was paid in and the balance changed from debit to credit of \$102,073.44; and
- (2) on October 17, 1966, when a cheque of \$250,000 was paid in and the balance changed from debit to credit of \$40,895.29.

It is also undisputed that after the same date, the company's account with the bank beginning from the end of December 1966, was consistently in debit to the tune of more than \$75,000, as follows:

End of December, 1966	\$114,823.12
End of January, 1967	176,579.28

End of February, 1967	298,940.94
End of March, 1967	253,274.32
End of April, 1967	243,443.93
End of May, 1967	403,042.05
End of June, 1967	128,762.28
End of July, 1967	308,253.59
End of August, 1967	354,030.73

The bank gave so much overdraft to the company because it was relying on guarantees given by persons other than the defendant, mainly personal guarantees given by the directors of the company all of whom are related to Mr. Gary Wong.

It is undisputed that the defendant did not know that the bank after August 4, 1966, was going to increase and had on several occasions increased the overdraft to the company. Indeed this cannot be disputed because there was no communication whatsoever between the bank and the defendant regarding these overdrafts until December 7, 1968, when the bank wrote to the defendant demanding payment of the \$75,000 guaranteed by him.

On behalf of the bank it is argued by Mr. O. C. Lim before us that its claim should be decided simply on the terms of the letter of guarantee. Its preamble reads as follows (omitting irrelevant words):

"In consideration of [the bank] making or continuing advances for as long as the bank may think fit to [the company], I [the defendant] hereby agree to pay to the bank on demand all sums of money which are now or shall at any time be owing to the bank from the company...."

Clause 4 of the letter of guarantee reads:

"This guarantee shall be a continuing guarantee and in full force until three calendar months after [notice given by the defendant as specified in the clause] ..."

Clause 7 reads, again omitting irrelevant words:

"[The bank] shall be at liberty, and without [the defendant's] further assent or knowledge at any time to enlarge any credit to the [company], as [the bank] may in [its] absolute discretion think fit, without discharging or in any manner affecting [the defendant's] liability under this guarantee."

Counsel for the bank submits that there is nothing in the letter of guarantee which restricts the bank's discretion to increase the company's overdraft and that the only clause that the defendant can rely on is the proviso to clause 2 which says that the defendant's liability under the guarantee is limited to \$75,000. Counsel for the bank quotes this passage from footnote 17 on page 879 of volume 2 of the Encyclopaedia of Forms and Precedents:

"Often a surety is only willing to guarantee the payment of advances made by a bank to a customer provided such advances do not exceed altogether a certain named figure which in the surety's opinion the customer will be able to meet. To carry out this intention the guarantee should not only provide that the surety's liability shall not exceed a certain sum, but should also stipulate that the advances shall not exceed the limit either, for without such a stipulation, there is nothing to prevent the bank from making unlimited advances to the customers (see *Laurie v. Scholefield*⁽¹⁰⁾)."

Counsel for the defendant retorts to all this as follows. He says that what counsel for the bank says is true only of English law, but not of Malaysian law which is governed by section 86 of the Contracts Act, and that parties here cannot contract out of section 86, and for this proposition he relies on an

A Indian case *K. R. Chitguppi & Co. v. Vinayak Kashi-nath Khadilkar*.⁽¹¹⁾ There the plaintiffs who were agents for sewing machines appointed the first defendant as their sub-agent to sell sewing machines for which he was to be paid commission at the rate of 7½% on the sale proceeds and to get all office expenses. At the same time, the second defendant agreed to be surety for the first defendant and wrote a letter of indemnity whereby he—

"expressly waived all or any of the rights as surety (legal, equitable, statutory or otherwise) which may at any time be inconsistent herewith and which he might be otherwise entitled to claim and enforce".

Subsequently the plaintiffs and the first defendant varied the contract between themselves without the knowledge of the second defendant, by providing that the first defendant was to be paid increased commission at the rate of 22% inclusive of all office expenses. When the contract of sub-agency had ended, the plaintiffs sued both defendants to recover money due under the sub-agency. The second defendant pleaded that the contract having been varied by the plaintiffs and the first defendant without his knowledge, he was absolved from liability as a surety under the provisions of section 133 of the Indian Contract Act, 1872 (which corresponds to our section 86). It was held by the Bombay High Court in its appellate civil jurisdiction that the second defendant was right. Hayward J. said that the provisions of the letter of indemnity were inconsistent with the provisions of the Contracts Act and they could not be given effect to as section 1 of the Act provides that nothing in the Act

"shall affect ... any incident of any contract, not inconsistent with the provisions of this Act".

There is a similar provision in our section 1, the effect of which is that all contracts are subject to the Contracts Act, and a contract may contain any terms consistent, but not terms inconsistent with the provisions of the Act.

With all due respect I do not agree with Mr. Sethu's arguments. The defendant has signed a continuing guarantee, guaranteeing the overdraft existing at the time when he signed the letter of guarantee as well as overdrafts to be made in the future. There is not a word in the guarantee limiting the guarantee only to the amount of the overdraft existing on the date of the letter of guarantee. Clause 7 whereby the defendant agreed to the bank "enlarging" the company's overdraft is not in my opinion an attempt to contract out of section 86; on the contrary, it is an attempt to comply with it, agreeing on the date the letter of guarantee was signed to the bank increasing the company's overdrafts in the future. It is said on behalf of the defendant that he could not on that date agree to an increase in the overdraft when the amount of the increase was not then known. With respect I do not agree. In my view to adopt such an argument in relation to overdraft guarantees would be to adopt too legalistic an attitude, and would result in grave inconvenience to the business of lending money by banks. With respect, the judgment in the Bombay case was right, for there the plaintiffs had varied the terms of their contract with their sub-agent and there was nothing in their agreement with the second defendant empowering them to do so.

Here on the other hand there was a provision in the letter of guarantee empowering the bank to do so, namely clause 7 which is not inconsistent with section 86.

The next argument on behalf of the defendant relates to section 64 of the Contracts Act which provides:

"Every promisee [meaning here the bank] may dispense with ... the performance of the promise made [by the defendant] to [it] ... or may accept instead of it any satisfaction which [it] thinks fit."

The gist of the argument is this, that in addition to the letter of guarantee signed by the defendant, the bank had also accepted guarantees given by the directors of the company, and as a result of the defendant's guarantee became merged in these other guarantees and therefore the defendant's liability has been discharged. With respect I cannot agree. Clause 9 of the letter of guarantee clearly provides:

"This guarantee shall be *in addition to* and shall not be in any way prejudiced or affected by any collateral or other security now or hereafter held by [the bank] for all or any part of the money hereby guaranteed..."

and it is the duty of the court to give effect to this explicit undertaking by the defendant.

The last argument on behalf of the bank relates to section 92 of the Contracts Act which provides:

"If the creditor [i.e., the bank] does any act which is inconsistent with the rights of the surety [i.e., the defendant], or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor [i.e., the company] is thereby impaired, the surety is discharged."

It is said that a surety gets no benefit from the guarantee provided by him; that to hold a surety liable everybody must be made to stick to the agreement; that here there was an agreement that the overdraft to the company was limited to \$75,000 and that it cannot be exceeded without the defendant's consent or knowledge; that it was so exceeded; that though the company's paid up capital was only \$250,000 yet the bank gave it an enormous overdraft and not only that, it also told other banks who enquired that the company's account was satisfactory, so much so that when the company was liquidated its liability totalled over \$1 million. Thus, it is said, the remedy of the defendant himself against the company was thereby impaired and consequently under section 92 the defendant was discharged. It is further said that parties could not contract out of this section, just as they could not contract out of section 86. With all due respect I do not think that section 92 applies. The bank has done nothing inconsistent with the defendant's rights. These rights are clearly spelled out in the letter of guarantee; as already stated, in my view that letter expressly empowers the bank to increase the company's overdraft and the defendant has explicitly — and validly — consented to the bank having this power.

I would therefore dismiss this appeal.

Lee Hun Hoe C.J. (Borneo) (read by Suffian L.P.): This is an appeal against the decision of the learned judge in giving judgment in favour of plaintiff/respondent in respect of a guarantee against defendant/appellant in the sum of \$75,000 with interest and costs.

A The main issue centred round the interpretation of the guarantee in determining whether defendant was liable under it.

Plaintiff carried on business as bankers in Kuala Lumpur. Malaysia Timber and Granite Products Ltd. (hereinafter referred to as MTGP) were plaintiff's customers. By a letter of guarantee (page 101 of

B Appeal Record) dated August 4, 1966 between plaintiff and defendant, the latter agreed to guarantee up to a limit of \$75,000 the payment on demand of all advances made by plaintiff to MTGP. In pursuance of the guarantee plaintiff made advances to MTGP amounting to \$534,408.74 including interest, commission and banking charges as at December 27, 1969. **C** Plaintiff demanded payment from MTGP but no payment was made. So, plaintiff through its solicitors wrote to defendant a letter dated August 11, 1969 demanding payment of the guaranteed sum of \$75,000 but defendant made no payment at all.

These facts are agreed by parties. The guarantee, in question was obtained from the defendant by the debtor. Before and after August 4, 1966 all personal guarantees were provided by the Directors of MTGP for various amounts culminating in a guarantee for \$400,000 dated May 6, 1967. The only occasions after August 4, 1966 when the current account of MTGP with plaintiff (No. 1804) in Kuala Lumpur showed a credit balance were (i) on September 19, 1966 when a cheque for \$250,000 was paid in and the balance changed from debit to credit of \$102,073.44, and (ii) on October 17, 1966 when a cheque for \$150,000 was paid in and the balance turned from debit to credit of \$40,895.29. After November 2, 1966 until August 1967 the said account never showed a credit balance. The account of MTGP with plaintiff was active until August 1968 and the plaintiff demanded repayment of overdraft from MTGP amounting to \$1,462,039.39 on December 7, 1968. A copy of the demand was extended to defendant. MTGP was ordered into compulsory liquidation on June 9, 1969 *vide* Companies (Winding up) No. 2 of 1969 in the High Court in Kuala Lumpur.

G There are seven grounds of appeal which have been argued under four main heads. Many of the arguments are interrelated and cannot be separated. Before going into the grounds it would be convenient to refer to the guarantee which has thirteen clauses. Only clauses 1 and 7 will be quoted in full while the other clauses will be mentioned briefly. Clause 1 states:—

H "In consideration of the Bangkok Bank Limited (hereinafter called the bank) making or continuing advances or otherwise giving credit or affording banking facilities for as long as the bank may think fit to MALAYSIA TIMBER & GRANITE PRODUCTS LIMITED of 7th floor, Bangkok Bank Limited, Kuala Lumpur (hereinafter called the principal) I/the undersigned

HENG CHENG SWEET,
Advocate & Solicitor,
Kuala Lumpur

I

hereby jointly and severally agree to pay and satisfy to the bank on demand all and every the sum and sums of money which are now or shall at any time be owing or remaining due and unpaid to the bank anywhere on any account whatsoever whether from the principal solely or from the principal jointly with any other person or persons or from any firm in which the principal may be a partner including the amount of notes or bills discounted or paid and other loans

credits or advances made to or for the accommodation or at the request either of the principal solely or jointly or of any such firm as aforesaid or for any moneys for which the principal may be liable as surety or in any other way whatsoever together with in all the cases aforesaid all interest discount commission and other bankers' charges including legal charges and expenses occasioned by or incident to this or any other security held by or offered to the bank for the same indebtedness or by or to the enforcement of any such security."

By clause 2, it is provided that "the total liability ultimately enforceable against me under this guarantee shall not exceed \$75,000." The guarantee by clause 3 is regarded as a continuing security on the balance due. Clause 4 permits the guarantor to determine the guarantee by notice in writing provided that the amount due not exceeding the limit is paid. Clause 5 deals with the situation in the event of the guarantee ceasing to be binding as a continuing security. Clause 6 makes it clear that if the debtor is liable the surety is also liable. Clause 7 provides that:—

"You shall in any case be at liberty, and without any further assent or knowledge at any time to grant to the principal or any person liable with or for him, whether as guarantor or otherwise, any time or indulgence, and to determine, enlarge or vary any credit to the principal and to vary exchange abstain from perfecting or release any other securities held or to be held by you for or on account of the moneys intended to be hereby secured or any part thereof, and to renew bills notes or other negotiable securities, and to compound with, give time for payment, accept compositions from and make any other arrangements with the principal, or any person so liable with or for him, as you may in your absolute discretion think fit, without discharging or in any manner affecting my liability under this guarantee."

Clause 8 protects the rights of the surety if the guarantee happens to be joint and several. Collateral security is dealt with by clause 9. Clause 10 says that although the ultimate liability of the surety cannot exceed the agreed limit the guarantee is to be treated as a guarantee for the whole principal moneys and interest owing. The last three clauses are mainly concerned with the rights of the bank.

This is one of the usual forms of guarantee. While it gives the bank a free hand, it ties both hands of the surety. One of the dominant factors of such form of guarantee is that while it reinforces the rights of the bank it tends to take away from the surety many rights that he would otherwise have. As Paget on the Law of Banking, 8th Edition, page 597 states:—

"A careful guarantor would decline so to bind himself; a careless one might afterwards contend he did not realise what it was to which he was binding himself. The surety cannot, however, claim relief on the ground of his own misconception of particular provisions or the general drift of the guarantee:

'If the defendant had understood the words of the guarantee he would not have entered into it, and the language carried more perhaps than the parties contemplated, but that is no reason for reading into the guarantee words, which I should have to do, to hold the guarantor discharged'." (per Wills J. in *Stewart and McDonald v. Young* (1894) 38 Sol. Jo. 385).

Appellant is a member of the legal profession and should or ought to know the implications and consequences before signing the guarantee. He would look ridiculous if he were to say he did not know what he was signing. So, he sought to avoid his liability by saying that by construing the guarantee in the light of surrounding circumstances he should not be liable. First, he complained that the learned judge did not appreciate the difference between the English

A law relating to guarantee and the Malaysian law of guarantee as codified in the Contracts Act, 1950, particularly sections 62, 86 and 92. He conceded that section 62 would only apply if the court decided section 86 in his favour. With respect, there is no substance in this allegation as the learned judge has dealt with the points raised by defendant with great care.

B He contended that by making further advances to MTGP considerably over the limit of \$75,000 without consulting him the plaintiff had breached the contract thus discharging defendant from his liability under the guarantee. This, defendant charged amounts to contracting out of section 86 of the Act. For section 86 of the Act to apply defendant has to show that the original contract between plaintiff and MTGP to which defendant stands surety has been varied without defendant's consent. Defendant cited the cases of *Union of India v. Pearl Hosiery Mills*;⁽¹²⁾ *Chitguppi And Co. v. Vinayak Kashinath*;⁽¹¹⁾ and *Holme v. Brunskill*⁽⁹⁾ to support his contention. In all these cases the sureties were discharged since there were variations in the original contracts. Defendant says there can be a breach of the term or object of the transaction as ascertained by the rule in *Prenn v. Simmonds*.⁽¹³⁾ There *Holme's* case⁽⁹⁾ is relevant to his contention. In that case defendant gave plaintiff a bond that the tenant of his farm would on the expiration of his tenancy re-deliver a flock of sheep on the farm in good order and condition. By an agreement between plaintiff and the tenant, the latter gave up a field on the farm and held the remainder at a reduced rental. The surety was discharged. Cotton L.J. remarked at page 505 that:—

"The true rule in my opinion is, that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that if he has not consented to the alteration, although in cases where it is without inquiry evident that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged; yet, that if it is not self-evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety, the court, will not, in an action against the surety, go into an inquiry as to the effect of the alteration...."

F Both parties referred to the operative words which I emphasized "with reference to the contract guaranteed". Defendant says they mean the contract between plaintiff and MTGP — the contract to give loans and that as surety he ought to be consulted. However, plaintiff says they indicate that there must be a breach of an agreement between plaintiff and defendant. The contract between plaintiff and MTGP is that of banker and customer. This relationship of banker and customer gives rise to greater flexibility than could have been the position if the relationship were merely that of debtor and creditor. A banker may use the money taken from his customers to form credit balances or for any purpose that he wishes as long as he honours his obligation to repay the money or pay it away in accordance with the instruction of his customer. The relationship between a banker and a customer is such that the banker may grant his customer overdraft facilities. In the present appeal there is no evidence of breach of the term of guarantee or of the agreement between plaintiff and MTGP. Clause 1 of the guarantee states clearly that it was in consideration of plaintiff "making or continuing advances or other-

wise of giving credit or affording banking facilities for as long as the bank may think fit..." to MTGP that defendant agreed to stand surety for \$75,000.

Further, plaintiff says that he is under no obligation to inform defendant of advances made to MTGP. If defendant is not happy with the guarantee he can get out of it under section 83 of the Act. Clause 4 of the guarantee also provides him with another way of escape. So long as the guarantee stands defendant has to meet his obligations. A guarantee is not a contract *uberrimae fidei* and, therefore, there is, no obligation on the part of plaintiff to disclose to defendant all material facts known to plaintiff. This brings me to the next contention of the defendant concerning implied term. A contract of guarantee, like all other contracts, depends primarily upon its expressed terms and the respective rights of the parties must be gathered from the guarantee form used in a particular case. It should be strongly emphasised that the effect of a guarantee depends very much on the form of words used in the contract. The general rule is that written contracts cannot be varied or contradicted by oral evidence. Defendant failed in his attempt to show that the guarantee had been varied and, therefore, he was discharged from his liability. Clause I of the guarantee indicates the consideration quite unambiguously. In the words of Lord Lyndhurst L.C. in *Clifford v. Turrell*.⁽¹⁴⁾

"...the settled rule of law is, that you may prove a further consideration stated on the face of the deed. You cannot be allowed to prove a consideration inconsistent with it, but you may prove another which stands with it."

The guarantee is clear. There is nothing to suggest that plaintiff as banker cannot advance MTGP above the limit of guarantee. Passages from the judgments of Lord Russell in *Wright And Another v. New Zealand Farmers' Co-operative Association of Canterbury, Ltd.*⁽¹⁵⁾ and of Azmi L.P. in *China Insurance Co. Ltd. v. Ngau Ah Kau*⁽¹⁶⁾ were cited. For the purpose of this appeal, it is sufficient to refer to *Laurie, P.O. v. Scholefield*⁽¹⁷⁾ where Byles J. said:—

"We are asked to construe a guarantee in these terms:— [The learned judge here read the guarantee.] In construing the guarantee, we cannot look to what was said at the time of giving it; such evidence is not admissible; but we may look at the position of the parties..."

It is a settled rule of law that a term will not be implied so as to contradict an express term. *Halsbury Laws of England*, 4th Edition, Volume 9, paragraph 356 provides that:—

"Whether a term will be implied is a question of law for the court. A term will not be implied so as to contradict any express term; and, in fact, a term ought not to be implied unless on considering the whole matter in a reasonable manner it is clear that the parties must have intended that there should be the suggested stipulation. The court has no discretion to create a new contract. Where a contract contains an express obligation by a party to the contract, it is for that party to show that there is some implied term which qualifies the obligation."

Apart from the guarantee given by defendant there were other personal guarantees given by the directors of MTGP. These guarantees were for various sums culminating in a guarantee dated May 6, 1967 for \$400,000 (See page 106 of Appeal Record). The format of all the guarantees is the same. There is no

substance in defendant's allegation that by allowing the amount of overdraft to exceed \$400,000 when the paid-up capital of MTGP was only \$250,000 plaintiff was reckless. It cannot be said plaintiff caused MTGP to go into compulsory liquidation as plaintiff did not control or manage the affairs of MTGP. It is true to say substantially plaintiff financed the business operation of MTGP by providing advances secured by guarantees. The bank manager explained that if banks were to be governed strictly by paid-up capital of their clients they would not be able to promote growth of business. The learned judge rightly came to the conclusion that plaintiff's bank manager had exercised his discretion in good faith. The plaintiff took other guarantees in order to protect its own interest. There is nothing wrong in that. I can see no reason why defendant should complain as his risk remains the same.

Plaintiff owes no duty to defendant to keep him informed of its dealings with MTGP or of any advance made to MTGP. Neither, is plaintiff under any obligation to inform defendant of any advances it might have made to MTGP before defendant's guarantee. This is because a contract of guarantee is not one *uberrimae fidei*. This position was laid down as early as 1845 by Lord Campbell in *Hamilton v. Watson*.⁽¹⁷⁾ In that case Peter Elles in 1835 obtained from his bank a loan of £750 against a bond by himself, his father and two other sureties. Upon the death of one of them in the same year, the bank pressed for payment or fresh security but neither was forthcoming. After continuous pressure from the bank, in 1837 a new bond was signed, in which the appellant joined as surety. The appellant knew nothing of the previous history of the advance. When Elles died, insolvent, and the appellant was called upon to pay to the bank the amount of the loan, he contended, *inter alia*, that he was not liable, as the full facts had not been disclosed at the time of his signing. The House of Lords found for respondent (the public officer of the bank). In his judgment, Lord Campbell observed:—

"If such was the rule, it would be indispensably necessary for the bankers to whom the security is to be given, to state how the account has been kept; whether the doctor was in the habit of overdraw; whether he was punctual in his dealings; whether he performed his promises in an honourable manner; — for all these things are extremely material for the surety to know. But unless questions be particularly put by the surety to gain this information, I hold that it is quite unnecessary for the creditor, to whom the suretyship is to be given, to make any such disclosure; and I should think that this might be considered as the criterion whether the disclosure ought to be made voluntarily, namely, whether there is anything that might not naturally be expected to take place between the parties who are concerned in the transaction, that is, whether there be a contract between the debtor and the creditor, to the effect that his position shall be different from that which the surety might naturally expect; and, if so, the surety is to see whether that is disclosed to him. But if there be nothing which might not naturally take place between these parties, then, if the surety would guard against particular perils, he must put the question, and he must gain the information which he requires."

The defendant never asked the plaintiff for any information. There was no communication between them up to the date of demand. He cannot expect plaintiff to volunteer information. *Hamilton's case*⁽¹⁷⁾ has been cited and followed since. In *Westminster*

Bank v. Cond⁽¹⁸⁾ the issue was simple. There the customer had an overdraft guaranteed by two sureties. As he wished to increase his borrowing he was told to produce additional security. Defendant agreed to guarantee the account for £300 and in an interview with the branch manager inquired whether the latter considered his customer's prospect good. The manager replied that in view of his customer's salary he did not think he would have difficulty in paying off the overdraft. Defendant did not ask about existing overdraft and the manager did not volunteer the information. The customer became insolvent. Defendant refused to pay under the guarantee contending that the manager owed him a duty to disclose a previous overdraft even though he did not ask for that particular information. Tucker J. held that there was no such duty. Again, in *Cooper v. National Provincial Bank Ltd.*⁽¹⁹⁾ the plaintiff contended that the bank should disclose certain information to him. Lawrence L.J. basing his judgment on the test laid down by Lord Campbell found that there was nothing in the contract between the bank and the customer which could be regarded as unusual, and that there was, therefore, no duty of disclosure.

In this case the defendant was approached by Gary Wong, his nephew, a director of MTGP to become a surety. The bank accepted him as a person willing to accept responsibility in connection with banking affairs of MTGP. Without special direction of the customer it would be wrong for the bank to disclose the whole particulars of the state of account of such customer.

Assuming that there was a variation, plaintiff submitted that the variation was not sufficient to discharge the surety under section 86. The variation was in the contemplation of the parties in that defendant knew of the rights of plaintiff under the guarantee. Under clause 7 defendant gave liberty to plaintiff, *inter alia*, "to determine, enlarge or vary any credit" to MTGP. The authors of A.I.R. Publication of "15 Years Digest" Volume 5, commenting on section 133 of the Indian Contract Act (*in pari materia* to our section 86) quoted Sarkar J. as saying:—

"An alteration is not material which carries out the intention of the parties already apparent on the face of the deed. The intention to carry out which an alteration is permissible is the intention with which the instrument was executed."

Those cases deciding that the variation is sufficient to discharge a surety seem to show that the entire agreement between the creditor and the principal is incorporated into the guarantee. In other words, they are made terms of the guarantee. As Pollock, B, commenting on the case of *Whitcher v. Hall*⁽²⁰⁾ in *Sanderson v. Astor*⁽⁶⁾ remarked:—

"That case (which was no doubt a very strong decision) has been acted on ever since, when the party who has become surety has taken care that the original agreement should be made part of his contract."

In any case this particular matter was dealt with, with respect, admirably by the learned judge at page 82 of the Appeal Record. He referred to *Sanderson v. Astor*⁽⁶⁾ and *National Bank of Nigeria Ltd. v. Awolesi*.⁽⁷⁾ He came to the conclusion, quite rightly, that the variation did not fall within the rule in *Holme v. Brunskill*.⁽⁹⁾ In view of this conclusion he felt that

A it was unnecessary to go into the question of implied term relating to the limit of the overdraft.

B On the question of additional securities, defendant contended that there was none for the same amount of \$75,000. They were in fact new applications for overdrafts which included the old loans as well as future loans. These guarantees were separate. It was submitted that the effect of the new guarantee was to discharge the old one by reason of section 64 of the Act. It was not necessary that defendant should be a party to this. The unilateral act of plaintiff released the defendant from liability. The answer to defendant's contention is to be found in the guarantee itself. Clause 9 clearly says that the guarantee shall be in addition to and shall not be in any way prejudiced or affected by any collateral or other security now or thereafter held by the plaintiff.

C Finally, defendant contended that as a surety he could have recourse against the assets of MTGP but because of further advances made by plaintiff MTGP had to go into compulsory liquidation and with the assets gone his remedy had been impaired. He, therefore, sought relief under section 92 of the Act. Plaintiff's answer to defendant was that the bank had nothing to do with MTGP incurring loss in business as it did not manage the affairs of and control the business of MTGP. The object of section 92 is to ensure that no arrangement different from the provisions contained in the surety's contract is forced upon him and that if the surety pays the debt he has every remedy which the creditor has against the principal debtor. Commenting on section 139 of the Indian Contract Act (which is equivalent to our section 92) Shaikat Mahmood on "The Contract Act" states at page 658 that:—

F "Anything done by the creditor which does not impair the rights of the surety would not discharge the surety. Thus the opening of a second account by a bank in favour of the principal debtor whose credit has been guaranteed in respect of a previous, without the consent and knowledge of the surety does not discharge the guarantee."

He added at page 661 that:—

G "Section 139 of the Contract Act can be invoked by a surety only if he is able to show that the creditor has done any act which is inconsistent with his (surety's) rights or omits to any duty and thereby impairs his (surety's) remedy against the principal debtor."

These propositions have the support of *Radha Kanta Pal v. United Bank of India*;⁽²¹⁾ *A.K.A. Khan Ghuznazi v. National Bank of India*;⁽²²⁾ and *Ah Yan v. President, Wabema Municipal Committee*.⁽²³⁾

H To determine the rights of defendant which are embodied in the guarantee, it is only necessary to look at the guarantee itself. In fact the evidence before the lower court does not show that plaintiff had done anything inconsistent with defendant's rights. After all, defendant is a legally qualified person and has been in practice for some years. He cannot say he did not know what he was signing. The gist of his bargain with plaintiff is simply that "if you will advance money to the company, I will be responsible to the extent of \$75,000 if the company does not pay."

I Defendant has conceded that if section 86 is against him then section 62 would not apply. However, out of respect to the parties and the learned

judge I would touch on it briefly. The contention of defendant is that the rule in *Clayton's case*⁽²⁴⁾ is relevant if the court hold that each separate guarantee constituted a separate loan. Then whatever payment made would go to wipe off the earlier loan thus rendering defendant's guarantee ineffective. This rule is codified in section 62 of the Contracts Act 1950 which is set out in full in the judgment of the learned judge. Defendant's contention has no merit as clauses 3 and 4 make it unequivocally clear that the guarantee is a continuing guarantee. Under clause 10 although the ultimate liability of the surety cannot exceed the limit the guarantee is to be treated as a guarantee for the whole principal moneys and interest owing. The learned judge clearly had clause 10 in mind when he said just before he concluded his judgment that "It is an established rule that a continuing guarantee is not affected by any payment in for it is framed to secure the final debit balance." In the *Encyclopaedia of Forms and Precedents*, 4th Edition, Volume 2 at page 764 it is stated, with reference to the rule in *Clayton's case*⁽²⁴⁾ that:—

"In such cases the repayment by credit items would be treated as appropriated to the earlier debits to the account, unless the form of security on which a banker relies indicates that the security is "by way of continuing security" or relates to the balance at any one time outstanding" or in some similar manner clearly evinces the intention that the amount secured is the net balance upon the account between the banker and the borrower."

Explaining the difference between specific and continuous guarantees in relation to *Clayton's case*,⁽²⁴⁾ the learned authors in *Sheldon's Practice and Law of Banking*, 10th Edition, at page 338 state that:—

"A continuing guarantee is not affected by any payment in, for it is framed to secure the final debit balance. This liability of the guarantor to be answerable for the final balance must be clearly stated in the guarantee, because, unless the contrary is explicitly stated in the memorandum, the law assume that the guarantee covers nothing but the debt due at the time the guarantee was entered into."

With respect, the learned judge was right to reject the defendant's contention as the liability was expressly stated in the guarantee. Further, as the learned judge pointed out, clause 4 itself provides that that guarantee shall be in addition to and shall not in any way be prejudiced or affected by any collateral or other security now or thereafter held by the plaintiff.

For reasons given, I would dismiss the appeal with costs both here and below. Deposits to defendant against taxed costs.

Suffian L.P.: My brother Wan Suleiman F.J. who is absent wishes me to say that he concurs.

The order of the court is that this appeal be dismissed with costs and that the appellant's deposit be paid to the respondent against its taxed costs.

Appeal dismissed. I

Solicitors: *Heng Cheng Swee & Co.; Chung & Huang.*

A H.H. COMPANY SDN. BHD. v. DIRECTOR-GENERAL OF INLAND REVENUE

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo) and Wan Suleiman F.J.) January 19, 1976]

[Kuala Lumpur — Federal Court Civil Appeal No. 102 of 1975]

Revenue Law — Income Tax — Company carrying on business in Malaysia and in Singapore — Whether Company can set off losses in Singapore against Malaysian income — Double Taxation Relief (Republic of Singapore) Order, 1966 — Income Tax Act, 1967, ss. 3 and 132.

The appellants had their head office in Kuala Lumpur and a branch office in Singapore. For the year of assessment 1968, the appellants had an income of \$31,415 from Malaysia but suffered a loss of \$538,335 attributable to its business in Singapore. The appellants sought to set off their loss in Singapore against their Malaysian income. The Special Commissioners held that the appellants were entitled to have their Singapore loss set off against their income derived from Malaysia but on a case stated to the High Court it was held that they were not so entitled. On appeal to the Federal Court.

Held, dismissing the appeal: the appellants were not entitled to set off the Singapore losses from their Malaysian income, as to do so would be to allow double deduction.

Cases referred to:—

- (1) *U.N. Finance Bhd. v. Director-General of Inland Revenue* [1975] 1 M.L.J. 109; [1975] 2 M.L.J. 224.
- (2) *Whimster & Co. Ltd. v. I.R.C.* 12 T.C. 813, 823.
- (3) *Odeon Associated Theatres Ltd. v. Jones* [1971] 2 All E.R. 407, 414.
- (4) *Ostomie (H.M. Inspector of Taxes) v. Australian Mutual Provident Society* 38 T.C. 492, 517; [1960] A.C. 459.

FEDERAL COURT.

S. Woodhull for the appellant.

F *Zulkifli bin Mahmood* (Senior Federal Counsel) for the respondent.

Suffian L.P.: There are two separate judgments in this appeal. First I shall read mine, and then that of my brother the Chief Justice of Borneo who is absent.

G **Suffian L.P.:** H. H. Company Sdn. Bhd. is a rubber dealer. I shall call it the taxpayer. It had its head office at railway godown No. xx, Kuala Lumpur. It also had a branch at xx, Cecil Street, Singapore, through which it carried on its business in Singapore.

It is ordinarily resident in Malaysia within the meaning of section 9 of the Income Tax Act, 1967, and it carried on business in Singapore through a permanent establishment within the meaning of Article II, 1(j) of the Double Taxation Agreement dated October 19, 1966 (published as P.U. 385 dated October 27, 1966). I shall refer to this Agreement simply as the Agreement.

We are concerned with the tax liability of the taxpayer for the year of assessment 1968. For that year the taxpayer had an income of \$31,415 from Malaysia, but suffered a loss of \$538,335 attributable to its business carried on through its Singapore branch.

Under paragraph 7 of schedule 7 to the Income Tax Act, 1967, the taxpayer elected that bilateral credit (*i.e.*, credit in respect of Singapore tax) should